Supreme Court, U.S.
FILED
MAY 21 1992
OFFICE OF THE CLERK

No. 91-6194

In the Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL CROSBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a federal court may try a criminal defendant in his absence when the defendant knowingly and voluntarily fails to appear for trial.

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OPINION BELOW

The opinion of the court of appeals (J.A. 52-69) is reported at 917 F.2d 362.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1991.[1] The petition for a writ of

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[1] The opinion of the court of appeals was filed on October 16, 1990. J.A. 52. In that opinion, the court remanded to the district court for consideration of an issue unrelated to the issue on which this Court granted certiorari, but the court of appeals retained jurisdiction over the case. J.A. 69. While the case was pending in the district court on remand, the court of appeals denied a petition for rehearing with suggestion for rehearing en banc. J.A. 70. On September 30, 1991,

certiorari was filed on October 21, 1991, and was granted on March 2, 1992. J.A. 72. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The Due Process Clause of the Fifth Amendment provides: "nor shall any person * * * be deprived of life, liberty, or property, without due process of law."

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to * * * be confronted with the witnesses against him."

Rule 43 of the Federal Rules of Criminal Procedure provides:

> (a) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) *Continued Presence Not Required.* The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or

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the court of appeals issued an order affirming the judgment of the district court "nunc pro tunc to January 24, 1991." J.A. 71. While that order is somewhat ambiguous, we believe that it is appropriate in calculating the timeliness of the petition to consider the judgment of the court of appeals to have been entered on September 30, 1991.

> (2) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.
>
> (c) *Presence Not Required.* A defendant need not be present in the following situations:
>
> (1) A corporation may appear by counsel for all purposes.
>
> (2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.
>
> (3) At a conference or argument upon a question of law.
>
> (4) At a reduction of sentence under Rule 35.

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on 25 counts of mail fraud, in violation of 18 U.S.C. 1341. Co-defendants Martin Cheatham and Jack Cunningham were also convicted; co-defendant James Sannes was acquitted. Petitioner was sentenced to 20 years' imprisonment, to be followed by five years' probation. J.A. 5. He was also ordered to make restitution in the amount of $240,035. J.A. 6. The court of appeals affirmed. J.A. 52-69.

1. Petitioner and his co-defendants devised a fraudulent scheme for selling a variety of products, including silver medallions, through the mail and by telephone. The medallions were marketed as "Vets for Vets commemorative medallions," and purchasers were falsely told that a portion of the sale proceeds

would fund a memorial to war veterans. See *United States* v. *Cheatham*, 899 F.2d 747, 748-750 (8th Cir. 1990) (upholding convictions of co-defendants Cheatham and Cunningham). Purchasers were also assured that the medallions would dramatically increase in value. *Id.* at 749. Between 1986 and 1988, the defendants sold about 5900 medallions for approximately $550,000. Only about 400 medallions, however, were actually delivered to the purchasers. *Id.* at 749-750.

On April 20, 1988, a grand jury in the District of Minnesota returned an indictment charging petitioner and his co-defendants with multiple violations of the mail fraud statutes, 18 U.S.C. 1341 and 1342. After a detention hearing on June 23, 1988, petitioner posted a $100,000 bond and was released on bail. J.A. 1, 12; Pet. C.A. Br. A14.

Petitioner appeared in person for a pretrial conference on August 15, 1988, at which the district court told the parties that trial was set for October 12, 1988. J.A. 41. A month later, the clerk sent a notice to all counsel confirming that the trial would begin at 9:30 a.m. on October 12, 1988. J.A. 42.

Petitioner personally attended another pretrial conference, on September 30, 1988, at which the court again advised the parties of the October 12 trial date. At that conference, counsel for petitioner told the court that he did not object to the trial date. J.A. 2, 42.

On October 7, 1988, five days before the trial was to begin, petitioner personally appeared in court a third time for a motions hearing. J.A. 42.[2] Petitioner asked the court for permission to travel to California, claiming that he needed to retrieve some personal records to use in preparing his defense. 10/7/88 Tr. 3, 8, 15-20. The court advised petitioner that it would not postpone the October 12 trial date to accommodate petitioner's belated request. J.A. 24, 26. Petitioner assured the court that he would return in two or three days. J.A. 24. The court then granted petitioner's request to leave the State. J.A. 28-30.

2. Petitioner's attorney and his three co-defendants were present for trial on the morning of October 12, 1988, but petitioner failed to appear. Petitioner's attorney told the court that he had not been able to reach petitioner by telephone that morning, but that he had spoken with him the day before and expected him to appear. J.A. 8, 9-10. The court issued a bench warrant for petitioner's arrest and dispatched a United States Marshal to petitioner's residence. J.A. 11-12.

The court reconvened later that day. The Marshal reported that the two deputies who visited petitioner's residence that day had found it "cleaned out." J.A. 19. The Marshal also said that a neighbor had told the deputies that on the previous night petitioner had backed his car into the garage and appeared to be packing things into the trunk. *Ibid.* The court advised the Marshal to contact petitioner's family in an effort to locate him. The court then asked the parties to state their views on what should be done. Petitioner's counsel objected to a trial *in absentia*, 1 R. 35, 53, and petitioner's co-defendants moved for a continuance until petitioner could be located, 1 R.

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[2] Although the district court did not expressly find that petitioner was present at the October 7, 1988, hearing, J.A. 42, it is clear from the transcript of that hearing that petitioner did personally attend. See, *e.g.*, 10/7/88 Tr. 2, 30. Petitioner acknowledges that he was present at the hearing. Pet. Br. 4.

41-44, 54-55. The government stated that it wanted to try the case as soon as possible, because the government had assembled a large number of witnesses, many of whom were elderly and from out of State. J.A. 23-24. The court continued the trial until Monday, October 17, 1988, but reserved decision on whether trial would go forward if petitioner had not appeared by then. J.A. 20, 35, 56.

On October 13, 1988, the court held a bond forfeiture hearing. At the hearing, the Marshal advised the court that the Marshals Service was still unable to locate petitioner. Petitioner's father, brother, and bondsman appeared at the hearing and told the court that they did not know where petitioner was. J.A. 43.

In a subsequent written order, the court granted the government's motion to proceed with the trial of petitioner and his co-defendants in petitioner's absence. J.A. 48-51. The court found that petitioner "had complete, full, and adequate notice of the charges and proceedings against him," including notice of the date on which the trial was scheduled to begin; that petitioner "deliberately, voluntarily, knowingly, and without justification failed to be present [at] the designated time and place for trial"; that there was "no reasonable probability that [petitioner] could be located shortly or that the trial could be rescheduled with [petitioner] in attendance"; that "the rescheduling of this trial would present extreme difficulty to the government, to the witnesses for the government, to defense counsel, and to the court"; and that requiring the government to try petitioner separately from his co-defendants would "impose a substantial burden upon the government, on the witnesses, and on the court." J.A. 48, 50. In connection with the last finding, the court noted that "[t]he government has listed 83 potential witnesses and in

excess, of 400 proposed exhibits for the trial," and that many of the witnesses were "elderly or infirm." J.A. 50-51. Based upon those findings, the court concluded that petitioner "voluntarily waived his constitutional right to be present during the trial," and that "[t]he public interest in proceeding with the trial in the absence of [petitioner] outweighs the interest of [petitioner] to be present during the conduct of the trial." J.A. 51.

3. The trial began on October 17, 1988. On November 18, 1988, the jury returned a verdict finding petitioner guilty on 25 counts of mail fraud. J.A. 54-55. Although petitioner was absent throughout, his counsel actively participated in the trial, presenting an opening statement and closing argument, conducting voir dire, introducing evidence and cross-examining witnesses, making objections, and arguing motions.[3] Sentencing was postponed pending petitioner's arrest.

Approximately seven months later, on June 14, 1989, petitioner was arrested in Florida. He was subsequently sentenced to four consecutive five-year terms of imprisonment on 22 of the counts, to be followed by five years' probation. The district court suspended sentencing on the three remaining counts, conditioned on petitioner's payment of $550,000 restitution to the victims of his scheme. J.A. 55. On remand following appeal, the district court reduced the amount of restitution that petitioner was required to pay to $240,035. J.A. 6, 67-69.

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[3] See, *e.g.*, 3 R. 122-127; 4 R. 251-253, 339-358; 5 R. 438, 567-574; 6 R. 657-677; 7 R. 820-829; 8 R. 1088-1093, 1141-1143; 10 R. 1525-1557; 11 R. 1688-1726; 12 R. 1877-1878; 13 R. 1907-1927, 1933-1938, 1946-1956, 1960-1975, 1989-1991; 14 R. 2000-2016, 2026-2040; 15 R. 2060-2088, 2135-2141, 2165; 17 R. 2327-2344.

4. The court of appeals affirmed petitioner's convictions. J.A. 52-69. It rejected petitioner's argument that Fed. R. Crim. P. 43 permits a defendant to be tried *in absentia* only when the defendant absents himself after initially appearing for trial. The court determined that Rule 43 addressed the situation of a defendant who absconds after initially appearing for trial because that was the factual situation before this Court in *Diaz* v. *United States*, 223 U.S. 442 (1912). The court stated that "Rule 43 does no more than restate the holding in *Diaz*" and does not preclude the trial *in absentia* of a defendant who absconds prior to trial. J.A. 57.

The court adopted the "analysis suggested by the Second and Fourth Circuits" for determining when a district court has discretion to try a defendant who has voluntarily absconded. J.A. 61. Under that analysis, the court said that district courts should consider, among other factors, "the likelihood that the trial can take place with the defendant present, the difficulty of rescheduling, and the burden on the government and inconvenience to jurors of having to undertake two trials * * * in a multiple defendant case." *Ibid.* Considering those factors in light of the district court's findings, the court of appeals "ha[d] no difficulty" in concluding that "[petitioner] waived his right to be present at trial and that the district court acted within its discretion in trying [petitioner] *in absentia*." *Ibid.*

SUMMARY OF ARGUMENT

A. The Constitution does not prohibit a court from trying a defendant who absconds prior to trial. This Court's decisions make clear that, while a criminal defendant has a right under the Sixth Amendment and the Due Process Clause to be present at trial,

that right may be waived. The defendant may waive the right to be present not only by expressly consenting to a continuation of trial in his absence, see *Diaz* v. *United States*, 223 U.S. 442 (1912), but also by "mere voluntary absence from his trial," *Taylor* v. *United States*, 414 U.S. 17, 19 (1973) (per curiam), and by other types of misconduct, see *Illinois* v. *Allen*, 397 U.S. 337 (1970). The reasoning of this Court's decisions holding that a defendant may waive the right to be present is fully applicable in the context of this case. Those decisions make clear that the Constitution does not protect conduct by an accused that is calculated to prevent a trial from occurring "until the accused person himself should be pleased to permit it." *Diaz*, 223 U.S. at 457 (quoting *Falk* v. *United States*, 15 App. D.C. 446, 454 (1899), cert. denied, 181 U.S. 618 (1901)). A defendant who knows when his trial is to begin and deliberately fails to appear for it demonstrates total disregard for the judicial system. The Constitution does not require a court in that situation to postpone the trial until the defendant chooses to attend.

B. Rule 43 of the Federal Rules of Criminal Procedure likewise does not prohibit a court from trying a defendant in his absence when the defendant knowingly and voluntarily fails to appear for trial. The Rule simply does not address the case of a defendant who willfully fails to appear for trial. Nor does the Rule by implication forbid a court from finding a waiver of the right to be present at trial in that situation. Instead, the Rule addresses several narrower issues, including: (1) whether the defendant is required to attend his own trial (he is); (2) whether his voluntary absence after the commencement of the trial prevents the court from continuing with the trial (it does not); and (3) whether he may be excluded

from the courtroom for disruptive behavior during the trial (he may). It is not reasonable to conclude that because the Rule recognizes a waiver of the right to be present in two particular settings, it must be read to prohibit a court from finding a waiver in any other case, including the case of a defendant who never appears for trial at all. Because the Rule does not prohibit a waiver in that setting, a court should be free to apply traditional waiver principles in light of the competing interests at stake.

C. This Court should not adopt the rule urged by petitioner—that even though a defendant knowingly and voluntarily fails to appear for trial, he may not be tried *in absentia*. Such a rule would draw a sharp and unjustified distinction between a defendant who absconds shortly after the start of trial and one who fails to show up for trial at all. The lower federal courts have correctly adopted the same approach in both situations, holding that a defendant may be tried in his absence when his absence is knowing and voluntary, and when postponing the trial would impose a significant burden on the other parties, the witnesses, and the court. That approach fully protects a defendant's right to be present at trial, while also protecting the judicial process from manipulation by defendants who place a high premium on avoiding a trial.

D. Petitioner was properly tried *in absentia*. The district court found (and petitioner does not dispute) that petitioner had actual knowledge of the date on which his trial was to begin, and that he deliberately failed to appear. The court further found that postponing petitioner's trial would cause significant hardship to the government, the numerous witnesses called to testify, and the court. Based on those findings, the court properly concluded that petitioner had waived

his right to be present at his trial and that it was appropriate to conduct the trial in petitioner's absence.

ARGUMENT

PETITIONER VALIDLY WAIVED HIS RIGHT TO BE PRESENT WHEN HE KNOWINGLY AND VOLUNTARILY FAILED TO APPEAR FOR TRIAL

A. A Defendant Can Waive His Constitutional Right To Be Present At His Trial By Electing Not To Appear

The "constitutional right to presence" is rooted in both the Confrontation Clause of the Sixth Amendment and the Due Process Clause. *United States* v. *Gagnon*, 470 U.S. 522, 526 (1985) (per curiam); *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970). In *Snyder* v. *Massachusetts*, 291 U.S. 97, 105-106 (1934), the Court held that a criminal defendant has a right to be present at any trial proceeding for which "his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." In cases involving felony charges, this Court has described the right to be present at trial as "scarcely less important to the accused than the right of trial itself." *Diaz* v. *United States*, 223 U.S. 442, 455 (1912).[4]

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[4] The right of a criminal defendant to be present at his trial derives from early Anglo-Saxon law, under which tribunals refused to enter judgment on a complaint unless the accused was physically present. 2 W. Holdsworth, *A History of the English Law* 105 (4th ed. 1936); 2 F. Pollock & F. Maitland, *The History of English Law* 594 (2d ed. 1968 reprint); Goldin, *Presence of the Defendant in Rendition of the Verdict in Felony Cases*, 16 Colum. L. Rev. 18, 18 (1916). After trial by jury succeeded earlier forms of trial, the right of presence was retained, being viewed as necessary to the court's jurisdiction. 2 W. Holdsworth, *supra*, at 105. An

Like the right to a trial, however, the constitutional right to presence may be waived. In *Diaz*, the Court held that a defendant waived his right to be present during trial by expressly consenting to a continuation of the trial in his absence. 223 U.S. at 453-459. The Court began its analysis with the observation that the Sixth Amendment right of confrontation (like the Philippine statutory equivalent at issue in that case) "is in the nature of a privilege extended to the accused, rather than a restriction upon him * * * and that he is free to assert it or to waive it, as to him may seem advantageous." *Id.* at 450. In *Taylor* v. *United States*, 414 U.S. 17, 19-20 (1973) (per curiam), the Court held that, even if the defendant has not given express consent to conducting the trial in his absence, "mere voluntary absence from * * * trial" may constitute an "effective[] waive[r]" of the right to be present. And in *Illinois* v. *Allen*, 397 U.S. 337, 343 (1970), the Court made clear that, even when a defendant insists on being present, he may be excluded from the courtroom if he behaves so disruptively as to prevent the trial from proceeding. Although this Court's decisions in *Diaz*, *Taylor*, and

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accused who voluntarily absented himself before trial was declared an "outlaw." 2 W. Holdsworth, *A History of the English Law* 604-605 (5th ed. 1942). In most felony cases, a declaration of outlawry "amount[ed] to a conviction of the crime of which the defendant [was] indicted, as much as if he had been actually found guilty by the verdict of a jury." 1 J. Chitty, *Practical Treatise on the Criminal Law* 365 (1847); T. Plucknett, *A Concise History of the Common Law* 431 (5th ed. 1956). An outlaw, once apprehended, was jailed, he was subject to execution, and he forfeited all of his property. 1 J. Chitty, *supra*, at 365; Moreover, until at least the mid-14th century, an outlaw could "lawfully be killed by anyone who happened to meet him." *Id.* at 366; see W. Holdsworth, *supra*, at 605.

Allen did not involve a defendant who deliberately failed to appear even for the beginning of his trial, the reasoning of those decisions leads to the conclusion that a waiver of the right to be present may occur in that context.

The decisions in *Diaz*, *Taylor*, and *Allen* were based upon the principle that a criminal defendant should not be permitted to defeat a trial by his own misconduct. Thus, the *Diaz* Court, quoting from an earlier court of appeals decision, stated:

> The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of [the] courts and juries and turn them into a solemn farce * * *. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted * * * an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield.

223 U.S. at 458 (quoting *Falk* v. *United States*, 15 App. D.C. 446, 460-461 (1899), cert. denied, 181 U.S. 618 (1901)). In *Taylor*, the Court similarly reasoned that "the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward." 414 U.S. at 20 (quoting *Illinois* v. *Allen*, 397 U.S. at 349 (Brennan, J., concurring)). In *Allen*, the Court rejected the notion that a criminal defendant's right to be present extended so far as to "permit[] [the defendant] by his disruptive conduct indefinitely to

avoid being tried on the charges brought against him." 397 U.S. at 346; see also *id.* at 345 (a court may imprison a disruptive defendant for contempt and discontinue the trial, but the court should "guard against allowing a defendant to profit from his own wrong" by "elect[ing] to spend a prolonged period in confinement for contempt in the hope that adverse witnesses might be unavailable after a lapse of time").

The principle that an accused should not, by his misconduct, be permitted to prevent a trial on the charges against him is directly applicable in the present context. A defendant has the duty both to appear for and remain present throughout trial. See 18 U.S.C. 3146; *Taylor*, 414 U.S. at 20 (citing *Stack* v. *Boyle*, 342 U.S. 1, 4-5 (1951)); see also Cohen, *Trial in Absentia Re-examined*, 40 Tenn. L. Rev. 155, 156 (1973) (distinguishing criminal defendant's "right of presence," which is "well-accepted," from a "right of absence," which is "generally unaccepted"). Requiring the court to order an open-ended postponement of trial would reward the defendant's misconduct by preventing a trial "until the accused person himself should be pleased to permit it." *Diaz*, 223 U.S. at 457 (quoting *Falk*, 15 App. D.C. at 454). This Court's decisions in *Diaz*, *Taylor*, and *Allen* make clear that the Constitution does not require such a result.

In short, both the Sixth Amendement right to confrontation and the due process right to be present at trial are subject to waiver. The Confrontation Clause merely ensures that the defendant has the right to confront witnesses if he chooses; it does not require that he exercise that right. And the Due Process Clause protects the defendant's right to be present only to the extent of ensuring him a "ful[l] * * * opportunity to defend against the charge[s]." *Gagnon*, 470 U.S. at 526 (quoting *Snyder* v. *Massachusetts*, 291 U.S. at 105-106). Due process is not offended when the defendant deliberately forgoes that opportunity.

B. Rule 43 Of The Federal Rules Of Criminal Procedure Does Not Prohibit A Court From Trying A Defendant Who Knowingly And Voluntarily Fails To Appear For Trial

Petitioner's principal argument is that, under Rule 43 of the Federal Rules of Criminal Procedure, a court may not try a defendant *in absentia* unless the defendant was present for the beginning of the trial. We recognize, of course, that the Rule does not authorize such a trial *in absentia*, but neither does the Rule prohibit it. The Rule is simply silent with respect to a court's options when a defendant voluntarily and knowingly fails to appear for trial at all.

Rule 43 provides that a defendant is "required" to be present "at the arraignment, at the time of the plea, [and] at every stage of the trial" Fed. R. Crim. P. 43(a); it also sets forth certain circumstances in which the defendant's presence is "not required," Fed. R. Crim. P. 43(c). Those provisions make clear, for example, that the defendant has an obligation to be present at trial; he may not "exercise" his right to be present by refusing to attend. See, *e.g.*, *United States* v. *Durham*, 587 F.2d 799 (5th Cir. 1979); *United States* v. *Moore*, 466 F.2d 547, 548 (3d Cir. 1972), cert. denied, 409 U.S. 1111 (1973); *United States* v. *Fitzpatrick*, 437 F.2d 19, 27 (2d Cir. 1970).[5]

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[5] It appears that the drafters of Rule 43 were concerned that the Rule not be read to give a criminal defendant the freedom to choose whether to appear at his trial or not. Early drafts of the Rule referred to the defendant's "right to be

Although Rule 43 clearly acknowledges the defendant's right to be present at trial, it makes only one express reference to that right. That reference is found in part (b) of the Rule, which provides that the right may be deemed waived "whenever a defendant, initially present, * * * is voluntarily absent after the trial has commenced," and whenever the defendant, after being warned, engages in conduct that disrupts the trial. The Rule does not expressly address whether a defendant may also be deemed to have waived the right to be present by knowingly and voluntarily failing to appear even for the commencement of his trial.

Petitioner ultimately acknowledges that his position is based not on the express provisions of Rule 43, but on the maxim *expressio unius est exclusio alterius*. Pet. Br. 25. Petitioner argues that since Rule 43 expressly provides for a waiver when the defendant absconds once trial has started, it implicitly precludes a finding of waiver when the defendant absconds before trial has begun. Pet. Br. 26. The problem with that argument is that Rule 43 does not purport to contain a comprehensive listing of the circumstances under which the right to be present may be waived. It is therefore neither surprising nor significant that

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present" at trial. See 1 M. Wilken & N. Triffin, *Drafting History of the Federal Rules of Criminal Procedure* 57 (1991) [hereinafter *Drafting History*]. In the final report of the Advisory Committee, however, the language stating that "[t]he defendant has the right to be present" was replaced by language stating that "[t]he defendant shall be present." 7 *Drafting History* 69. That revision may have been prompted by comments voicing concern that the earlier formulation could be read to allow defendants to exercise their "right" in a manner that would defeat orderly trial procedures. See 2 *Drafting History* 235; 3 *Drafting History* 511.

the Rules does not address the question whether a defendant may be tried *in absentia* if he fails to appear for trial at all. Cf. *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1148-1150 (1992) (rejecting statutory interpretation based on negative implication).

From the outset, the principal provisions of Rule 43 have consisted of a codification of this Court's decisions on the obligation and right of the defendant to be present at trial. The Advisory Committee Notes to the original version of Rule 43 make clear that both the provision requiring the defendant to be present and the provision authorizing a finding of a waiver after the commencement of the trial are "restatement[s] of existing law." Notes of Advisory Committee on Rules, 18 U.S.C. at 1982 (1946). It is therefore appropriate in construing the Rule to look to the "existing law," as this Court had defined it.

When Rule 43 was adopted in 1945, it was well established that a defendant's right to be present at trial could "be lost by consent or at times even by misconduct." *Snyder* v. *Massachusetts*, 291 U.S. at 106. The Court had "expressly rejected" the "broad dicta" in early decisions suggesting that the right could never be waived. *Illinois* v. *Allen*, 397 U.S. at 342 (citing *Diaz* v. *United States*, 223 U.S. 442, 453 (1912)); see also *Frank* v. *Mangum*, 237 U.S. 309, 338-343 (1915) (defendant in capital case waived right to be present when verdict was returned).

In *Diaz*, the Court applied that principle of waiver by holding that, although the defendant had a right under applicable Philippine laws to be present at all stages of his trial, he validly waived that right by voluntarily absenting himself after trial began. *Id.* at 455. The holding in *Diaz* was later codified in the

provision of Rule 43 that "[i]n prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict." 18 U.S.C. at 1982 (1946).

Petitioner acknowledges (Pet. Br. 14-16) that Rule 43 was meant to codify the Court's decision in *Diaz*, and that the Rule should be read in light of that decision. He argues, however, that *Diaz* stands for the proposition that a waiver of the right to be present can never be found when a defendant absconds before his trial begins. See Pet. Br. 15-16 (*Diaz* applied "a clear-cut rule * * * that a trial actually pending before a jury may proceed as to an absent defendant only if he was initially present"). Yet, nothing in *Diaz* suggests that a defendant may be tried *in absentia* only if he absconds after a trial begins, and not if he absconds prior to trial. Nor is any such suggestion made in the decisions cited in *Diaz*. Those decisions, like *Diaz* itself, simply upheld the convictions of defendants who were absent during part of their trials and did not address the question of the validity of trying an absent defendant who had absconded prior to trial. See *Diaz*, 223 U.S. at 455-456.

Indeed, aside from language in several 19th-century decisions suggesting that a defendant's right to be present at trial can *never* be waived, see, *e.g.*, *Lewis* v. *United States*, 146 U.S. 370, 372 (1892); *Hopt* v. Utah, 110 U.S. 574, 579 (1884), we are unaware of any federal case decided prior to the adoption of Rule 43 holding that a defendant who absconds prior to trial cannot be tried *in absentia*. Nor has our research revealed any federal decisions expressly approving trial *in absentia* in that situation. In short, the question presented in this case had seldom, if ever, arisen.

The important point is that there was no common law rule prohibiting trial *in absentia* of a defendant who absconded prior to trial. Since Rule 43 was intended to restate existing law, it should not be construed as adopting such a prohibition.[6]

C. This Court Should Not Adopt A Rule Barring The Trial Of A Defendant *In Absentia*, Even When The Defendant Knowingly And Voluntarily Fails To Appear For Trial

Apart from the provisions of Rule 43, petitioner urges this Court to adopt a rule prohibiting the trial

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[6] In 1974, Rule 43 was amended, again for the purpose of codifying the result of one of this Court's decisions, *i.e.*, "to reflect *Illinois* v. *Allen*." Advisory Committee Note on 1974 Amendment, 18 U.S.C. App. at 821 (1988). As amended, Rule 43 expressly authorizes the court to exclude a disruptive defendant from the courtroom. The 1974 amendment did not address the question presented here, but an earlier amendment proposed by the Advisory Committee in January 1973 would have done so. The 1973 Advisory Committee proposal stated that a defendant "shall be considered to have waived his right to be present whenever * * * a defendant, who has personally entered a plea to the charge and has been personally advised when the trial is to commence, voluntarily, knowingly, and without justification, fails to be present at the designated time and place for trial." Committee on Rules of Practice and Procedure, Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, etc.* 32 (Jan. 1973), *microformed on* CIS No. CM-4213 (Congressional Info. Serv.). It is not clear why the 1973 proposal was rejected, although the Committee may have chosen simply to leave the issue for further development in the courts. That seems particularly likely in light of this Courts' disposition of *Tacon* v. *Arizona*, 410 U.S. 351 (1973) (per curiam). That case was expected to decide the question whether the Constitution permits a trial *in absentia*, but the Court left that question open when it dismissed the writ as improvidently granted because the issue had not been preserved below.

in absentia of a defendant who deliberately fails to appear for trial. Pet. Br. 11, 29-30. Petitioner contends that, even if that rule is not required by the Constitution, it is compelled by "the high value which the American justice system places on having a defendant present at his trial," *id.* at 24. The rule petitioner proposes, however, would unjustifiably treat defendants who abscond prior to trial differently from defendants who abscond after the trial has begun. The lower courts have correctly applied the same approach in both situations, and that approach fully protects the defendant's right to be present at trial.

We recognize the importance of the defendant's presence at his trial. The presence of the defendant, and his concomitant ability to confront the witnesses against him and assist in his defense, help preserve the integrity of the factfinding process. See *Illinois* v. *Allen*, 397 U.S. at 347 ("Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace.") (Brennan, J., concurring); see also *White* v. *Illinois*, 112 S. Ct. 736, 743 (1992); *Kentucky* v. *Stincer*, 482 U.S. 730, 736, 745 (1987). Those considerations, however, apply with the same force whether the defendant absconds prior to trial or after the trial begins. To hold that a waiver may occur only in the latter situation would create a perverse incentive for defendants contemplating flight to do so at the earliest opportunity.

As petitioner acknowledges, Pet. Br. 18 n.6, no court has construed either Rule 43 or the Constitution to require reversal of the conviction of a defendant who deliberately failed to appear for trial and was tried *in absentia*.[7] On the contrary, every court of

[7] Petitioner cites (Pet. Br. 18 n.6) *United States* v. *Hudson*, 313 F. Supp. 422 (D. Del. 1970), as suggesting that a defendant who absconds prior to trial may not be tried *in absentia*. *Hudson*, however, did not involve a trial *in absentia*, but was a petition by sureties on a bail bond to vacate an order forfeiting the bond. In response to the sureties' argument that they should not be penalized for the defendant's failure to appear for trial because the trial could have been held in the defendant's absence, the district court suggested that the defendant could not have been tried in his absence under Rule 43 because he was not present at the commencement of the trial. *Id.* at 426. That suggestion was dictum, however, because the court went on to reject the sureties' argument as "completely irrelevant" to the validity of the forfeiture order. *Id.* at 427.

Petitioner seeks to explain the absence of case law supporting his position by asserting that no appealable order results from a trial court's decision not to hold a trial in the defendant's absence. As we note below, however, there have been many occasions when district courts have tried defendants who absconded before trial, and every court of appeals that has considered the issue has upheld the practice.

appeals to consider the issue has held that a defendant who knowingly and voluntarily absconds prior to trial may be tried in his absence.[8] So, too, a majority

[8] *United States* v. *Lochan*, 674 F.2d 960, 963, 967-968 (1st Cir. 1982); *United States* v. *Mera*, 921 F.2d 18, 20-21 (2d Cir. 1990); *United States* v. *Sanchez*, 790 F.2d 245, 249 (2d Cir.), cert. denied, 479 U.S. 989 (1986); *United States* v. *Barton*, 647 F.2d 224, 238-239 (2d Cir.), cert. denied, 454 U.S. 857 (1981); *United States* v. *Pastor*, 557 F.2d 930, 933-939 (2d Cir. 1977); *United States* v. *Tortora*, 464 F.2d 1202, 1209-1210 (2d Cir.), cert. denied, 409 U.S. 1063 (1972); *Government of the Virgin Islands* v. *Brown*, 507 F.2d 186, 189 (3d Cir. 1975); *United States* v. *Schocket*, 753 F.2d 336, 340 (4th Cir. 1985); *United States* v. *Muzevsky*, 760 F.2d 83, 84 (4th Cir. 1985); *United States* v. *Powell*, 611 F.2d 41, 42 (4th Cir. 1979); *United States* v. *Peterson*, 524 F.2d 167, 184 (4th Cir. 1975), certs. denied, 423 U.S. 1088 and 424 U.S. 925 (1976); *Arizona* v. *Hunt*, 408 F.2d 1086, 1095-1096 (6th Cir. 1969); *United States* v. *Houtchens*, 926 F.2d 824, 826-827 (9th Cir. 1991); *Brewer* v. *Raines*, 670 F.2d 117, 119 (9th Cir. 1982); *United States* v. *Edmonson*, No. 90-3189 (10th Cir. May 6,

of the state courts to address the question have held that a defendant who absents himself before trial waives his right to be present.[9]

Those decisions recognize that there are no "talismanic properties" that distinguish the commencement of a trial from later stages so as to justify one rule for defendants who abscond prior to trial and a different, more flexible, rule for those who abscond after trial begins. *Government of the Virgin Islands* v. *Brown*, 507 F.2d 186, 189 (3d Cir. 1975); accord *United States* v. *Peterson*, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976). As the court of appeals in this case observed, "the voir dire examination [of the prospective jurors] is probably not as critical as cross-examination of the key witnesses, which occurs in the later phases of a trial. It would be anomalous to attach more significance to a defendant's absence at commencement than to absence during more important substantive portions of the trial." J.A. 58; accord *Brown*, 507 F.2d at 189. The courts have properly concluded that the principle

1992), slip op. 14-19; *United States* v. *Wright*, 932 F.2d 868, 879 (10th Cir.), certs. denied, 112 S. Ct. 428 and 450 (1991); see also *United States* v. *Crews*, 695 F.2d 519, 520-521 (11th Cir. 1983) (upholding conviction of defendant who signed written waivers of right to be present at commencement of trial).

[9] See, *e.g.*, *McCaffrey* v. *State*, 577 N.E.2d 617 (Ind. Ct. App. 1991); *State* v. *Galloway*, 817 P.2d 1124 (Kan. Ct. App. 1991); *Thomas* v. *State*, 586 So. 2d 282 (Ala. Crim. App. 1991); *State* v. *DeWeese*, 816 P.2d 1 (Wash. 1991); *Murphy* v. *State*, 555 N.E.2d 127 (Ind. 1990); *Barnett* v. *State*, 512 A.2d 1071 (Md. 1986); *State* v. *Jackson*, 351 S.E.2d 167 (S.C. 1986); *State* v. *Kirk*, 699 S.W.2d 814 (Tenn. Crim. App. 1985), cert. denied, 475 U.S. 1023 (1986); *State* v. *Zavala*, 666 P.2d 456 (Ariz. 1983). Others, however, have taken a different view, see *Hunter* v. *Commonwealth*, 409 S.E.2d 483 (Va. Ct. App. 1991); *Commonwealth* v. *Felton*, 307 A.2d 51 (Pa. 1973), cert. denied, 415 U.S. 984 (1974).

underlying this Court's decisions in *Diaz*, *Taylor*, and *Illinois* v. *Allen*—that "the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward," *Taylor*, 414 U.S. at 20 (quoting *Illinois* v. *Allen*, 397 U.S. at 349 (Brennan, J., concurring))—applies equally to commencing and continuing a trial when a defendant deliberately chooses not to attend.

Contrary to petitioner's contention (Pet. Br. 10-11, 26-28), the courts have not resorted to "ad hoc" procedures to determine under what circumstances a defendant who fails to appear for trial may be tried in his absence. The courts have followed the same approach that they apply under Rule 43(b)(1) when a defendant initially appears for trial but later absconds. See, *e.g.*, *United States* v. *Lochan*, 674 F.2d 960, 967-968 (1st Cir. 1982). That approach is the one first adopted by the Second Circuit in *United States* v. *Tortora*, 464 F.2d 1202, cert. denied, 409 U.S. 1063 (1972). See J.A. 59-61.[10]

The *Tortora* analysis entails a two-part inquiry. The first part is directed to the question whether the defendant has knowingly and voluntarily absented himself from trial, *i.e.*, whether his conduct can properly be held to be a waiver of his right to be present. The *Tortora* court held that "[i]t must clearly appear in the record * * * that the defendant was advised when proceedings were to commence and that

[10] *Tortora* was apparently the first decision expressly addressing whether a defendant who fails to appear for trial may, consistently with Rule 43 and the Constitution, be tried in his absence. See Starkey, *Trial in Absentia*, 53 St. John's L. Rev. 721, 727-728 (1979). *Tortora* has been widely cited in other circuits. See, *e.g.*, *Wright*, 932 F.2d at 879; *Houtchens*, 926 F.2d at 826-827; *Lochan*, 674 F.2d at 968; *Peterson*, 524 F.2d at 185-186; *Brown*, 507 F.2d at 189.

he voluntarily, knowingly, and without justification failed to be present at the designated time and place before the trial may proceed in his absence." *Tortora*, 464 F.2d at 1209. The courts of appeals have made clear that convictions are subject to reversal if the evidence is inadequate to support such a finding.[11]

The second part of the *Tortora* inquiry is directed to the question whether, having found a waiver, the court should proceed with trial, or whether it would be an abuse of the court's discretion to do so. Because it is "obviously desirable" that a defendant be present at his own trial, the court held that a district court should proceed with trial in the defendant's absence only after determining that the public interest in proceeding with trial "clearly outweighs that of the voluntarily absent defendant." *Tortora*, 464 F.2d at 1210. In making that determination, the court noted that the district court should consider factors such as the likelihood that the defendant will reappear in the near future; the difficulty of rescheduling the trial; whether the trial involves multiple defendants, and if so, whether the government would be unduly burdened by having to conduct multiple trials involving overlapping evidence; and whether rescheduling the trial would impose an undue burden on the government's witnesses. *Ibid.*; see also *United States* v. *Sanchez*, 790 F.2d 245, 251 (2d Cir.), cert. denied, 479 U.S. 989 (1986).

Under that standard, trial *in absentia* remains very much the exception rather than the rule. Nonetheless, providing district courts with the authority to

[11] See, *e.g.*, *United States* v. *Camacho*, 955 F.2d 950, 954 (4th Cir. 1992); *United States* v. *Alikpo*, 944 F.2d 206, 208-209 (5th Cir. 1991); *United States* v. *Hernandez*, 873 F.2d 516, 519 (2d Cir. 1989); cf. *Cureton* v. *United States*, 396 F.2d 671, 676 (D.C. Cir. 1968).

conduct trials *in absentia* in appropriate cases has given those courts an important source of authority to ensure that defendants do not by their misconduct thwart "the proper administration of criminal justice," *Illinois* v. *Allen*, 397 U.S. at 343.[12] There is therefore no reason for this Court to reject the uniform line of lower court authority and hold that a court may not find that an absconding defendant has waived his right to be present at trial.

D. The District Court Properly Found That Petitioner Knowingly And Voluntarily Absented Himself From Trial

Petitioner contends (Pet. Br. 28) that in "certain cases" defendants who fail to appear for trial and are tried *in absentia* will be deprived of procedural due process. He suggests, as an example, that a defendant's due process rights would be violated if the court failed to find that the absent defendant had knowledge of the trial date. *Ibid.*[13] In a similar vein, peti-

[12] It is particularly important in cases involving serious crimes that courts have the capacity to hold trials *in absentia*, because in those cases the other available remedies may be inadequate to discourage defendants from absconding. When a defendant faces likely conviction and a substantial sentence, the threat of contempt sanctions or a prosecution for bail jumping (18 U.S.C. 3146) in the event of his ultimate arrest may not be enough to counter the incentive to flee. *Tortora*, 464 F.2d at 1209; see also *Illinois* v. *Allen*, 397 U.S. at 344-345.

[13] In connection with that example, petitioner refers (Pet. Br. 27, 28) to *United States* v. *Mera*, 921 F.2d 18 (2d Cir. 1990). That reference is misleading, however. In *Mera*, the trial court specifically found, following an evidentiary hearing, that the absconding defendant had actual knowledge of the date on which his trial was scheduled to commence. *Id.* at 19. The court of appeals sustained that finding, holding

tioner's amicus suggests that it would be unconstitutional to try a defendant in his absence if the defendant failed to appear for trial because of illness. ACLU Amicus Br. 11.[14] Those hypothetical cases, however, present issues quite different from the one presented in this case, *i.e.*, whether a court may try a defendant *in absentia* after finding that the defendant has knowingly and voluntarily absented himself from the trial.

While some cases may present a serious question whether a defendant has knowingly and voluntarily waived his right to be present, this case is not one of them. Petitioner does not, and cannot, dispute that he knew when his trial was to begin. He personally appeared in court on three occasions when the trial date of October 12, 1988, was discussed. See J.A. 48-49. That date was also set forth in a written notice to counsel. J.A. 48. In addition, petitioner's attorney told the court that there was no objection to the trial date. J.A. 49.

Petitioner does not point to anything, other than his desire not to attend, that might have kept him away from his trial. In fact, there was ample evidence that

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that it was not clearly erroneous. *Id.* at 20. The court of appeals held, in the alternative, that it was not necessary for the defendant to know the precise date because, by appearing at arraignment and pleading to the charges, he had notice of the proceedings against him. *Id.* at 20-21.

[14] Amicus does not cite (and we are not aware of) any case involving that situation. Of course, the circumstances would be very different if, for example, a hospitalized defendant expressly waived his presence at a portion of the trial, see *United States* v. *Crews*, 695 F.2d at 520, or if a defendant feigned illness or decided to schedule elective surgery at a time that would interfere with the trial, see *United States* v. *Barton*, 647 F.2d at 238.

petitioner abandoned his residence precisely in order to avoid standing trial. See J.A. 19, 25. Nor does petitioner complain about the adequacy of the procedures that the trial court employed in deciding whether to hold the trial. The court made extensive inquiries in an effort to locate petitioner, which involved the Marshals Service and petitioner's family and bondsman. J.A. 43-44, 49-50. In short, the district court's finding of waiver in this case is unassailable.

It is equally clear that the district court, having found a waiver, did not abuse its discretion in proceeding to trial in petitioner's absence. The district court correctly concluded that granting a severance to petitioner and indefinitely postponing his trial would impose an unusually heavy burden on the government, the witnesses, and the court. The four-defendant trial in this case was scheduled to run a number of weeks, and the government had assembled a total of 83 witnesses to testify in its case-in-chief. Many of those witnesses were elderly and infirm, and many of them had to travel to Minnesota from across the country and from Canada. J.A. 44, 51, 61 n.3. The case for holding a single trial on or shortly after the scheduled trial date was therefore compelling.

In sum, this case presents a clear example of a defendant's purposeful effort to defeat justice by absconding from trial, where the options of postponing the entire trial or granting a severance to the co-defendants and contemplating a later, separate trial for the absconding defendant would have been very burdensome. It was therefore proper for the district court to conclude that petitioner had waived his right to be present and that the trial should be conducted in his absence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MAY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE, 1992 312324 45433